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No. 92-_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF MISSOURI,

Petitioner,

vs.

SAMUEL LEVI ERWIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

JEREMIAH W. (JAY) NIXON
Attorney General OF MISSOURI

JOHN M. MORRIS III
Assistant Attorney General
Counsel of Record

P.O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER A JURY INSTRUCTION WHICH READS THAT "AN INTOXICATED CONDITION FROM ALCOHOL WILL NOT RELIEVE A PERSON OF RESPONSIBILITY FOR HIS CONDUCT" CONTAINS A MANDATORY EVIDENTIARY PRESUMPTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS CONSTRUED BY SANDSTROM V. MONTANA.

2. WHETHER UNDER THE STANDARD ENUNCIATED IN BOYDE V. CALIFORNIA, A REASONABLE LIKELIHOOD EXISTS THAT THE JURY MISAPPLIED THE ABOVE INSTRUCTION IN LIGHT OF OTHER INSTRUCTIONS WHICH INFORMED THE JURY THAT THE STATE BORE THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT AS TO ALL ELEMENTS OF THE CRIME.

3. WHETHER, ASSUMING ARGUENDO THAT THE ABOVE INSTRUCTION STATED A MANDATORY EVIDENTIARY PRESUMPTION IN VIOLATION OF SANDSTROM V. MONTANA, A HOLDING TO THIS EFFECT COULD BE LIMITED BY THE SUPREME COURT OF MISSOURI TO CASES TRIED IN THE FUTURE AND CASES PRESENTLY ON DIRECT APPEAL IN WHICH THE CONSTITUTIONAL VALIDITY OF THE ABOVE INSTRUCTION WAS PRESERVED FOR APPELLATE REVIEW.

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OPINIONS BELOW

The final opinion by the Supreme Court of Missouri, as modified on March 23, 1993, is reported as State v. Erwin, 848 S.W.2d 476 (Mo. banc 1993), and also appears in the petitioner's Appendix beginning at page 55. The original opinion by the Missouri Supreme Court, rendered on February 23, 1993, is not reported and is reproduced in petitioner's Appendix beginning at page 25. The opinion by the Missouri Court of Appeals, Western District, dated May 5, 1992 and superceded by the transfer of this cause to the Supreme Court of Missouri, is not reported and appears beginning at page 1 of the petitioner's Appendix.

JURISDICTIONAL STATEMENT

The Supreme Court of Missouri, en banc, issued its opinion reversing the respondent's conviction and remanding the cause for a new trial on February 23, 1993. Petitioner's motion for

rehearing was denied on March 23, 1993, on which date the Supreme Court of Missouri modified its opinion on the court's own motion. Pursuant to Supreme Court Rules 13.1 and 13.4, the present petition for a writ of certiorari was required to be filed within ninety days of March 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution provides as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Section 562.076, RSMo 1986, provides as follows:

> 1. A person who is in an intoxicated or drugged condition whether from alcohol, drugs or other substance, is criminally responsible for conduct unless such condition is involuntarily produced and deprived him of the capacity to know or appreciate the nature, quality or wrongfulness of his conduct.
>
> 2. The defendant shall have the

burden of injecting the issue of intoxicated or drugged condition.

3. Section 565.021.1, RSMo 1986, provides in pertinent part as follows:

> 1. A person commits the crime of murder in the second degree if he:
> (1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person;
> * * *

4. Section 562.016.3, RSMo 1986, provides as follows:

> A person "**acts knowingly**", or with knowledge,
> (1) With respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
> (2) With respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result.

STATEMENT OF THE CASE

The respondent, Samuel Levi Erwin, was charged by indictment on February 24, 1989 with first degree murder, §565.020, RSMo 1986, and armed criminal action, §571.015, RSMo 1986. Respondent's cause proceeded to trial before a jury on December 9, 1989, in the Circuit Court of Jackson County, Missouri. The jury found respondent guilty of the lesser homicide offense of second degree murder, §565.021.1(1), RSMo 1986, and also of armed criminal action. Pursuant to the recommendation of the jury, respondent was sentenced to life imprisonment for second degree murder and fifty years imprisonment for armed criminal action, the sentences to run consecutively.

A. The Crime

Viewed in the light most favorable to the verdict, the evidence showed the following: the victim, seventeen-year-old Aaron Cochran, lived with his parents and two brothers on a farm located in Atherton, northeast of Kansas City. Respondent, also seventeen, had been an acquaintance of Aaron's for several years. In early August of 1988, respondent came uninvited to the Cochran home and watched Aaron's older brother, Ronald Cochran, engage in target practice behind his house. After target practice was over, respondent followed Ronald into the basement, where Ronald lived and where he kept his firearms collection. Among the weapons which was visible in the basement at this time was a Mossberg 12-gauge pump shotgun, which Ronald kept unloaded and in a case on his gunrack.

On Friday, August 19, about a week after respondent had visited the Cochran house, Aaron Cochran mentioned to a friend that he was planning to meet respondent at 10:00 that evening at a

shopping mall. Early that evening, Aaron went to a movie and then drove around with two of his friends. At around 8:30 p.m., Aaron met another friend and obtained from him a six-pack of beer and a half-empty box containing a wine cooler. Aaron drank a small quantity of the wine cooler as he and a friend drove to the mall to meet respondent. When they arrived at around 10:00 p.m., they looked for respondent but were unable to find him. After visiting a girlfriend, Aaron left for home at around 12:30 a.m., on Saturday, August 20. The other members of the Cochran family were not at home: Aaron's parents were out of town and his older brother Ronald was at work.

According to respondent's later statements to police, he went to Aaron Cochran's home at around 12:35 a.m., after missing him several hours earlier. Aaron arrived at around 1:00 a.m., and the two watched a movie until approximately 3:15 a.m. During this time, some of the beer and wine cooler that Aaron had brought home was apparently consumed: the empty wine cooler box and several beer cans were found in the kitchen, and a blood sample taken from the victim's body indicated that he had five-hundredths of one percent of alcohol in his bloodstream, half of the legal threshold in Missouri for intoxication. After watching the movie, Aaron went to his upstairs bedroom and went to bed, while respondent remained downstairs.

At some point after Aaron Cochran had gone to bed, respondent went to the basement of the Cochran house, where Ronald Cochran lived and where his firearms collection was kept. Respondent took Ronald's Mossberg 12-gauge pump shotgun out of a gunrack, where it had been when respondent was in the basement a week earlier. In order to make this weapon usable, respondent first had to remove it from its storage case. He then had to obtain 12-gauge shotgun shells from a nearby shelf

and load three shells one by one into the shotgun, the maximum shell capacity for this weapon. Lastly, respondent was required to switch the shotgun's safety from "on" to "off". The victim's bedroom was two floors up from the room where respondent obtained the shotgun.

When respondent entered the victim's upstairs bedroom with the shotgun, Aaron Cochran was asleep, lying prone on the bed, wearing only underwear. From a distance of roughly four feet, respondent shot the victim in the back of the head with the shotgun. Respondent then pumped the shotgun, ejecting the spent shell, and shot Aaron a second time in the back of the head. The shotgun blasts destroyed the back of the victim's skull and propelled the larger part of his brain onto a bedside table. Respondent ejected the second spent shell, and then went downstairs to the kitchen pantry, where he ejected the remaining live round from the shotgun.

The jury could reasonably infer that after shooting Aaron Cochran to death, respondent returned to Ronald Cochran's basement room, reloaded the Mossberg shotgun and fired a number of shotgun blasts into the walls and ceiling; in doing so, he severed the telephone line into the house. Thereafter, respondent stole the Cochran family's station wagon and attempted to drive away, but the vehicle got stuck in a nearby field. Respondent then returned to the Cochran residence, where he ransacked the residence, taking two shotguns (including the murder weapon), at least five hundred rounds of ammunition, and numerous items of clothing and paramilitary gear owned by Aaron and Ronald Cochran. At some point, respondent changed out of the clothing he had worn at the time of the shooting and put on camouflage pants which he took from Aaron Cochran's room and a Guns and Roses T-shirt owned by the victim's brother,

Ronald.

Taking the firearms, ammunition and other stolen items, respondent got into the Cochran's other vehicle, a grain truck, and drove it northward across a levee and through a field. Slightly over a mile from the Cochran residence, the truck became bogged down near the Missouri River and respondent abandoned it, leaving some of the stolen property, including the murder weapon, in or near the vehicle. Police found a trail of other items for some distance through brush and along the bank of a nearby creek. Respondent's fingerprints were on the barrel of the shotgun used to kill Aaron Cochran. Respondent surrendered to police that afternoon, some ten hours after the murder. In oral, written and videotaped statements taken by police on that day and the next day, respondent asserted that he "thought" he had shot Aaron Cochran and claimed that he was intoxicated at the time.

As part of the defense evidence, respondent offered the testimony of a psychologist that appellant was in an "alcoholic blackout" as a result of his alleged voluntary intoxication and therefore could not have acted knowingly or deliberately. Objections were made to respondent's assertion of voluntary intoxication on the ground that this was not a defense under Missouri law, and this testimony was ultimately excluded by the court. In conformity with the law of Missouri, the jury received the following instruction:

> "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct" (Petitioner's Appendix, hereinafter "Pet.App.," at page 91).

The jury declined to convict respondent of

the charge of first degree murder, but found him guilty of the lesser included offense of conventional second degree murder, and also of armed criminal action in the course of the homicide.

B. Procedural History

Following his conviction, respondent filed an appeal to the Missouri Court of Appeals, Western District. On May 5, 1992, the Court of Appeals rendered a decision affirming the respondent's conviction (Pet.App. 1-23); on the same date, however, the court transferred the cause to the Supreme Court of Missouri "for re-examination of existing law" (Pet.App. 24).

On February 23, 1993, the Supreme Court of Missouri handed down an opinion which reversed respondent's conviction and remanded the cause for a new trial (Pet.App. 25-44). Thereafter, the petitioner filed a motion for rehearing in the Missouri Supreme Court (Pet.App. 45-53), which motion was denied by an order dated March 23, 1993 (Pet.App. 54). On the court's own motion, a modified opinion was issued on the same date (Pet.App. 55-76). This petition follows.

C. Presentation of Issue to State Courts

In the Motion for New Trial following his conviction, respondent alleged that the submission of the jury instruction on voluntary intoxication, quoted above, and the exclusion of evidence on this subject "deprived the defendant of his Fifth and Fourteenth Amendment due process rights. . . ." Respondent did not expressly contend, either in his Motion for New Trial or in his brief to the Missouri Court of Appeals, Western District, that the instruction at issue created a presumption of an element of the crime in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). A single-judge

instruction at issue created a presumption of an element of the crime in violation of Sandstrom v. Montana, 442 U.S. 510 (1979). A single-judge opinion by the Court of Appeals suggested that the exclusion of defense evidence on the subject of voluntary intoxication violated due-process principles, but similarly did not address whether the jury instruction was governed by the holding of Sandstrom (Pet.App. 13-20).

Upon transfer of this cause to the Supreme Court of Missouri, respondent argued and a majority of the Supreme Court held that the Missouri instruction on voluntary intoxication violated Sandstrom. Petitioner contested this claim in its brief to the Supreme Court and in its post-decision Motion for Rehearing (Pet.App. 45-53).

ARGUMENT

The respondent, Samuel Levi Erwin, killed Aaron Cochran by shooting him twice in the back of the head with a shotgun as the victim lay asleep in bed. In order to be convicted of second degree murder -- the crime of which respondent was ultimately found guilty -- he was required to "knowingly" cause the death of the victim, meaning that he know that his conduct was practically certain to cause that result. Sections 565.021.1(1) and 562.016.3(2), RSMo 1986. The jury at respondent's trial was instructed to this effect and was further directed that it could not find respondent guilty unless it found this intent element beyond a reasonable doubt (Pet.App. 83, 85).

A thoroughly-settled principle of Missouri law is that a defendant cannot rely upon his voluntary consumption of alcohol or drugs in support of a claim that he did not form the required criminal intent. State v. Richardson, 495 S.W.2d 435, 440 (Mo. banc 1973); State v. Woltering, 810 S.W.2d 584, 587-588 (Mo.App. 1991); §562.076.1, RSMo 1986.[1] In accordance with this principle of law, and

[1]While this appears to be the minority position nationally, at least seven other states join in the Missouri view that voluntary intoxication cannot be considered as a basis for a claim that the defendant lacked criminal intent. State v. Souza, 72 Haw. 246, 813 P.2d 1384, 1385-1386 (1991); Lanier v. State, 533 So.2d 473, 478 (Miss. 1988); Foster v. State, 258 Ga. 736, 374 S.E.2d 188, 194-196 (1988), cert. denied 490 U.S. 1085 (1989); White v. State, 290 Ark. 130, 717 S.W.2d 784, 786-788 (1986); Wyant v. State, 519 A.2d 649, 651-660 (Del. 1986);

(continued...)

in light of respondent's claim in his statements to police that he was voluntarily intoxicated and did not recall shooting the victim, an instruction was given to the jury which read, in its entirety, as follows:

> "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct" (Pet.App. 91).

In the majority opinion below, the Supreme Court of Missouri expressly acknowledged the above principle of Missouri law and that the instruction to the jury accurately stated that rule. State v. Erwin, 848 S.W.2d 476, 482-483 (Mo. banc 1993) (Pet.App. 64-66). It held, however, that this instruction violated the holding of this Court in Sandstrom v. Montana, 442 U.S. 510 (1979) because it "implicitly relieves the state of proving an element of the offense," that the defendant acted knowingly. State v. Erwin, supra, at 484 (Pet.App. 68). The majority explained its reasoning as follows:

> "The instruction here creates a reasonable likelihood that the jury would believe that if defendant was intoxicated, he was criminally responsible regardless of his state of mind. That reading has the effect of

[1](...continued)
Pimentel v. State, 710 S.W.2d 764, 778 (Tex.App. 1986); State v. Vaughn, 268 S.C. 119, 232 S.E.2d 328, 330-331 (1977). Other jurisdictions apply this rule to some categories of crimes but not to others. E.g., Commonwealth v. Ellis, 398 Pa.Super. 538, 581 A.2d 595, 604 (1990); see Annot., 8 A.L.R.3d 1236 (1966).

excusing the state from proving the defendant's mental state beyond a reasonable doubt and violates due process under Sandstrom." State v. Erwin, supra at 483 (Pet.App. 66).

A. The Decision Below Conflicts With Sandstrom v. Montana and Its Progeny

In a series of decisions beginning with Sandstrom v. Montana, supra, this Court has recognized that the Due Process Clause of the Fourteenth Amendment precludes instructions to the jury which state mandatory evidentiary presumptions on the ground that they have the effect of relieving the prosecution of its burden of persuasion beyond a reasonable doubt on all elements of the crime. Id. at 520-524; Francis v. Franklin, 471 U.S. 307, 313-315 (1985); Carella v. California, 491 U.S. 263, 265 (1989). This Court has identified two categories of instructional presumptions which inherently violate due process: conclusive presumptions, which "[remove] the presumed element from the case once the State has proved the predicate facts giving rise to the presumption," Francis v. Franklin, supra at 314 (n. 2); and burden-shifting presumptions, in which the presumption is rebuttable but the burden of persuasion rests upon the defendant to rebut it. Id.; Sandstrom v. Montana, supra at 524. A third species of presumption, permissive inferences, "do not necessarily implicate the concerns of Sandstrom," although they may infringe upon due process if the inference "is not one that reason and common sense justify in light of the proven facts before the jury." Francis v. Franklin, supra at 314-315; see Ulster County Court v. Allen, 442 U.S. 140, 157 (1977).

The instruction at bar contains neither a

conclusive nor a burden-shifting presumption, or even a permissive inference. It does not, by any stretch of the imagination, direct the jury that the required criminal intent should be inferred from respondent's voluntary intoxication. To the contrary, it points out, accurately and properly, that voluntary intoxication plays no role in either establishing or refuting that respondent acted knowingly in killing Aaron Cochran.

Nor does this instruction state or suggest to the jurors that respondent had the burden of persuasion on anything. In determining whether the state had proven the elements of second degree murder beyond a reasonable doubt, including the element of specific intent, the jury was entitled to consider the defendant's statements, conduct, and all of the circumstances surrounding the murder. The sole and entire significance of the instruction at issue was that the jury could not consider respondent's claim that he was voluntarily intoxicated on the issue of whether he had the necessary intent. This principle of law is not a presumption, and Sandstrom and its progeny are wholly irrelevant to its validity.

In its opinion, the Supreme Court of Missouri cites Sandstrom but offers no significant explanation as to how that decision governs the instruction at bar. On its face, this instruction does not convey to the jury that if respondent was voluntarily intoxicated, he should be found "criminally responsible regardless of his state of mind," State v. Erwin, supra at 483 (Pet.App. 66). To the contrary, the instruction states only that such intoxication is not a factor in this determination. Petitioner detects no possible rational basis for the proposition that instructing the jury that "an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct" involves a conclusive or burden-shifting

presumption, and no support whatever for this conclusion is offered by the Missouri Supreme Court. Petitioner submits that this distortion of Sandstrom and of the Due Process Clause warrants the attention of this Court.

B. The Decision Below Misapplies Boyde v. California

In Boyde v. California, 494 U.S. 370 (1990), this Court reaffirmed the well-settled principle that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Id. at 378, quoting Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). This Court additionally reviewed various standards which had been applied to construe jury instructions -- including that stated in Francis v. Franklin, supra, cited by the Missouri Supreme Court in its original opinion (Pet.App. 36) -- and arrived at a new test:

> "In this case we are presented with a single jury instruction. . . . The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think a proper inquiry in such case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, supra at 380-381.

The modified majority opinion by the Missouri Supreme Court paid lip service to Boyde by rephrasing its holding in terms of a "reasonable likelihood" (Pet.App. 66), but flatly disregarded or misapplied the substance of that holding. The court failed to give effect to the fact that the jury was

instructed not once but twice in its instructions that the state bore the burden of establishing the necessary criminal intent beyond a reasonable doubt (Pet.App. 94-96). One of those instructions read as follows:

> "Unless you find and believe from the evidence beyond a reasonable doubt that the defendant knowingly caused the death of Aaron Cochran, you must find the defendant not guilty of murder in the second degree" (Pet.App. 85).

While such language "is not rhetorically inconsistent with a conclusive or burden-shifting presumption," Sandstrom v. Montana, supra at 518 (n. 7), the fact remains that, unlike Sandstrom, there was no conclusive or burden-shifting presumption submitted to the jury in this case. For the reasons discussed above, it was flatly untenable for the Supreme Court of Missouri to find a "reasonable likelihood" that this state's intoxication instruction, read together with all other instructions given to the jury, would be applied by twelve jurors to dispense with an essential element of the crime or to shift the burden of proof from the state to respondent.

C. The Court Below Misstated the Scope and Application of Its Constitutional Holding

The majority opinion by the Supreme Court of Missouri states as follows:

> "This ruling shall be applicable only in cases tried in the future and cases now subject to direct appeal where the issue is preserved that MAI-CR3d 310.50 violated due process because it relieves the state of its burden of

proof as to the requisite mental state"

State v. Erwin, supra at 484 (Pet.App. 68-69).

While this prospective application of a purported violation of the United States Constitution would, in relative terms, favor the state, petitioner cannot in good faith forbear to note that this is a bizarre misstatement of principles enunciated in numerous decisions of this Court. The finding of a Sandstrom violation by the Supreme Court of Missouri is, by definition, not a new principle of constitutional law, but rather the application of a preexisting constitutional doctrine. Compare Lee v. Missouri, 439 U.S. 461, 462 (1979) (application of existing constitutional law) with Allen v. Hardy, 478 U.S. 255, 258 (1986) (pronouncement of new constitutional rule).

If the instruction at bar indeed contained a mandatory presumption as proscribed by Sandstrom -- a theory which is contrary to any colorable reading of the instruction -- such holding could not be limited to pending or future cases. For all of the above reasons, the decision of the Missouri Supreme Court grossly misconstrues the United States Constitution, and review should be granted by this Court.

CONCLUSION

Petitioner respectfully requests that this petition for a writ of certiorari be granted, and that the judgment of the Supreme Court of Missouri be reversed on the grounds stated above.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JOHN M. MORRIS III
Assistant Attorney General
Counsel of Record

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

(2)

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RESPONDENT'S BRIEF IN OPPOSITION

PATRICK J. BERRIGAN
Assistant Public Defender
Capital Litigation Unit
Western Division
Missouri Public Defender System
505 East 13th Street, Suite 430
Kansas City, Missouri 64106
(816) 889-2059
(816) 283-0307 (Facsimile)

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent respectfully suggests that only one issue is raised in this Petition and that the Missouri Supreme Court has artfully phrased it as follows:

> Whether the instruction on defendant's intoxication, patterned after MAI-CR3d 310.50 ["You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct."], violates the defendant's right to due process of law because the instruction effectively creates a presumption that an intoxicated person has the requisite mental state, relieving the state of its constitutional burden of proving all elements of the offense beyond a reasonable doubt.

State v. Erwin, 848 S.W.2d 467, 481 (Mo. banc 1993).

The other questions presented by Petitioner are ancillary to this issue and lack independent federal standing. Respondent addresses them nonetheless.

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FACTS OF THE CRIME – RESTATED

Although Petitioner has set forth its own view of the case, both the Missouri Supreme Court and the Missouri Court of Appeals, Western District, objectively found the facts to be as follows:

Defendant Levi Erwin killed Aaron Cochran with a shotgun blast to the head as Aaron lay sleeping on his bed at 3:30 or 4:00 o'clock on a Saturday morning, August 20, 1988. Aaron was 17 years old. Levi, also 17, was an overnight guest in Aaron's house. The evidence shows nothing of any motive for the killing. Levi and Aaron were friends. Levi said, in a later videotaped statement made to sheriff's deputies, "[W]e were just like brothers."

The only account of the events surrounding the killing comes from Levi's own statements to the sheriff's deputies, made later in the day of the killing and on the day following. A videotape of his statement made to the officers on the second day after the killing was shown to the jury at the trial, and the jury members were furnished with transcripts thereof.

Aaron lived with his parents and two brothers in their rural home. The parents and the brothers were absent from home on this night, and Levi's overnight stay was prearranged between himself and Aaron. The two youths were not together during Friday evening, but each was engaged in other activities with other friends. Levi was driven by a friend to the Cochran house and dropped off there at about 12:35 a.m. Aaron had not yet arrived home. He got home about 1:00 a.m.

Aaron had brought home with him a small keg of "Matilda Bay," which the evidence describes as a wine cooler, and a six-pack of beer. After Aaron got home, the two boys watched "The Three Stooges" on television, then watched a videotaped Vietnam movie, "Purple Hearts." Levi later told the police officers that the movie excited him. Both Levi and Aaron were involved in a paramilitary group called "Atherton Defense Group."

Aaron and Levi drank the Matilda Bay and five cans of the beer – the sixth had been broken – as they watched the movie. Levi himself drank three glasses of Matilda Bay, but he did not say how much beer. At about 3:15 a.m., Aaron went upstairs to bed. He had difficulty climbing the stairs. After his death, his blood alcohol was found to be .05 percent. One tenth of one percent (.10 percent) blood alcohol content would indicate intoxication.

After Aaron had gone to bed, Levi went to the basement of the house to get a gun to take with him on a nocturnal quadrunner ride "because I thought maybe I would see a wolf or something out there." In the basement he shot off some rounds with a 12-guage pump action shotgun. (The sheriff's deputies, when they came to the house later, found the walls and the ceiling of the basement had been shot into. The water pipes in the basement had been damaged by shot so that the basement was flooded.) Levi then apparently took the shotgun upstairs and shot Aaron, who was asleep on his bed. From the massive head wound and other evidence, witnesses concluded there was a second shot. In his later statement Levi said, "I don't really know, but I'm not saying it for a fact, but I can picture myself shooting

Aaron in his room." Asked if he considered this person that was lying on the bed to be Aaron, he answered, "No. I never thought about it until afterwards." He estimated the time of the shooting at 3:30 or 4:00 o'clock in the morning.

Levi, after the shooting, dropped the shotgun and ran outside. He drove across a plowed field in a station wagon and got the station wagon stuck. He returned to the Cochran house and fell asleep in the cab of a grain truck. When he awakened in the morning, he vaguely remembered shooting in the basement. He went into the house. He went upstairs and realized he had shot Aaron. He got the shotgun from Aaron's room. He returned a second time to Aaron's room. "I remember looking at Aaron's body again to hope that it was a nightmare or something, and it wasn't."

Levi attempted to call his parents but found the phone was dead. Officers later discovered the phone wire had been severed by one of the shotgun blasts in the basement of the house. He walked to the nearby house of one Carl Martin. There was no one home. He took a truck and drove to his own home in Independence, a distance, we surmise, of 10 or 12 miles, where he lived with his mother and father. He gave his mother and father a confused and hysterical account of the event described above. The father called the sheriff's office. Sheriff's deputies repaired to the Cochran house. There they found the gruesome scene, which can be imagined from what had transpired there.

REASONS FOR DENYING THE WRIT

I. THE MISSOURI SUPREME COURT DID NOT ERR IN FINDING THAT THE MISSOURI APPROVED INSTRUCTION STATING THAT "VOLUNTARY INTOXICATION WILL NOT RELIEVE A PERSON OF RESPONSIBILITY FOR HIS CONDUCT" VIOLATES DUE PROCESS PURSUANT TO THIS COURT'S DECISION IN *SANDSTROM V. MONTANA*

This case presents no new question of law. The sole issue before the Court is whether an instruction, which says "You are instructed that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct," violates the due process clause of the Fourteenth Amendment by creating a presumption which alleviates the government's burden of proving each element of a crime beyond any reasonable doubt. Although petitioner insists that the instruction at bar is merely a restatement of proper Missouri law regarding voluntary intoxication, it is patently obvious, and the Missouri Supreme Court found, that the instruction "creates a reasonable likelihood that the jury would believe that if defendant was intoxicated, he was criminally responsible (for his conduct) regardless of his state of mind," thereby unconstitutionally relieving the state of its burden of proof in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). *State v. Erwin*, 848 S.W.2d 476, 483 (Mo. banc 1993).

A. THE MISSOURI APPROVED INSTRUCTION ON VOLUNTARY INTOXICATION CONTAINS A MANDATORY/CONCLUSIVE PRESUMPTION IN VIOLATION OF *SANDSTROM V. MONTANA*

It does not stretch the imagination to envision the likelihood that the jury in this case interpreted the instruction "that an intoxicated condition from alcohol will not relieve a person of responsibility for his conduct" as a mandatory presumption. Similar to the instruction at issue in *Sandstrom* ("[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 515), there is a reasonable likelihood that the jury in respondent's trial may have interpreted the instruction to mean that "a person is criminally responsible for his conduct even absent intent." In other words, being voluntarily intoxicated makes one *strictly liable* for any and all ensuing conduct.

Indeed, the Missouri Supreme Court noted petitioner's claim in oral argument that "voluntary intoxication stands in the place of intent," which is reasoning completely consistent with strict liability but totally contrary to Missouri law. *Erwin*, 848 S.W.2d at 483. This constitutional defect is particularly fatal in a case such as respondent's, where although the act of killing was admitted, there was considerable dispute as to respondent's intent and mental state at the time. Under the Missouri instruction, the jury may have reasonably presumed that respondent possessed that state of mind which makes him most "responsible" for the death of the victim "knowingly" killed. This presumption obliterates

the obligation to prove the mental state of the accused *beyond a reasonable doubt*.

B. BURDEN – SHIFTING PRESUMPTION

A state must prove every element of an offense beyond a reasonable doubt, and may not shift the burden of proof to respondent by means of an instruction containing a rebuttable presumption. *Sandstrom*, 442 U.S. at 524, *discussing Patterson v. New York*, 432 U.S. 197, 215 (1977). It is quite reasonable that the jury may have believed the commanding language of the instruction ("will not relieve") to mean that if respondent is found to be intoxicated, then he is presumed responsible for his conduct regardless of specific intent, a presumption that respondent must then disprove. It was not error to find that the state would be relieved of its burden of proof beyond a reasonable doubt with respect to an element of the crime and be in violation of due process under *Sandstrom*.

II. THE MISSOURI SUPREME COURT WAS CORRECT IN ITS APPLICATION OF *BOYDE V. CALIFORNIA*.

Although "a single instruction to a jury may be judged in artificial isolation, . . . this does not mean that an instruction by itself may never rise to the level of constitutional error," especially if the instruction is capable of misinterpretation. *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). Simply because other proper instructions were given does not necessarily mean that the inference is cured of its likely effect. The test is "whether there is a

reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

There was undisputed evidence of respondent's voluntary intoxication before the jury during his trial. The Missouri Supreme Court noted that, unlike the other *general* instructions discussing the presumption of innocence and burden of proof, the voluntary intoxication instruction is a *specific directive* to the jury on particular evidence before them, the defendant's voluntary intoxication:

> Other instructions were given which correctly gave defendant a presumption of innocence and placed the burden of proof on the state as to all elements of the crime of second degree murder including whether defendant acted knowingly. However, an instruction relating to specific evidence which may be read to relieve the state of its burden of proof as to a mental state is not cured by another general instruction placing the burden on the state. The two instructions are contradictory. A jury is as likely as not to resolve the contradiction favorably to the state. That likelihood requires the court to grant relief. *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

848 S.W.2d at 483 n.4.

The voluntary intoxication instruction is also given to the jury after all of the general instructions, *see* MAI-CR3d, making it all the more likely that the jury will consider it a modification of the previously given general instructions for a case involving a voluntarily intoxicated

defendant. Even the petitioner's counsel apparently thought in this manner, arguing to the Missouri Supreme Court that "voluntary intoxication stands in the place of intent" under Missouri law. 848 S.W.2d at 483. As the Court pointed out, if learned counsel for the State could not figure out which instruction was correct, it is unlikely a jury of nonlawyers would be able to do so. *Id.*

III. THE MISSOURI SUPREME COURT DID NOT ERR IN THE SCOPE AND APPLICATION OF ITS HOLDING

The Missouri Supreme Court, in following the *Sandstrom* decision, "has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law . . . " *Yates v. Aiken*, 484 U.S. 211, 216 (1986), *quoting Desist v. United States*, 394 U.S. 244, 263-264 (1969). The court is not stating a new rule of constitutional law. However, petitioner concludes, with no support other than attenuated reasoning, that in finding a mandatory presumption in violation of *Sandstrom* the court is precluded from "limit[ing] (its holding) to pending or future cases." Brief for Petitioner, 16. The lower court's pronouncement of the scope of its decision is not an issue of any relevance to respondent's case, and despite petitioner's unarticulated premise for why this issue requires the Court's attention, the scope and application of the lower court's decision remains proper under review.

For support, petitioner cites *Lee v. Missouri*, 439 U.S. 461 (1979), and *Allen v. Hardy*, 478 U.S. 244 (1986), which

both deal with the application of laws retroactively. However, respondent's case does not present a similar situation in which a recent Supreme Court decision may or may not impact favorably on a respondent if the case were reconsidered in light of that Supreme Court decision.

"[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *United States v. Johnson*, 457 U.S. 537, 549 (1982).

Petitioner admits that the decision in *Erwin* is not a new principle of constitutional law, and it should not be applied retroactively. Petitioner's concern that potential claims will be stifled by non-retroactive application is feigned at best. In the interest of justice the lower court did not err in limiting the *Erwin* decision to cases now pending and in the future.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the Missouri Supreme Court should be denied.

Respectfully submitted,

PATRICK J. BERRIGAN
Missouri Bar Number 34321
Assistant Public Defender
Capital Litigation Unit
Western Division
Missouri Public Defender System
505 East 13th Street, Suite 430
Kansas City, Missouri 64106
(816) 889-2059
(816) 283-0307 (Facsimile)

Attorney for Respondent